

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Ruth Y. Goldway, Chairman;
Mark Acton, Vice Chairman;
Tony L. Hammond; and
Nanci E. Langley

Rate Adjustment Due to Extraordinary or
Exceptional Circumstances

Docket No. R2010-4R

ORDER RESOLVING ISSUES ON REMAND



Washington, DC 20268-0001

September 20, 2011

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APPENDIX—Comments and Reply Comments

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I. EXECUTIVE SUMMARY

On May 24, 2011, the United States Court of Appeals for the District of Columbia Circuit issued its opinion in *United States Postal Service v. Postal Regulatory Commission*, 640 F.3d 1263 (D.C. Cir. 2011), denying in part and granting in part the Postal Service's petition for review of Order No. 547.¹ Order No. 547 denied a Postal Service request under 39 U.S.C. § 3622(d)(1)(E) for an exigent rate adjustment because the proposed exigent rate adjustments were not "due to" extraordinary or exceptional circumstances. *Id.* at 27.

¹ Docket No. R2010-4, Order Denying Request for Exigent Rate Adjustments, September 30, 2010 (Order No. 547).

The Court affirmed the Commission's interpretation that the plain meaning of the phrase "due to" in section 3622(d)(1)(E) mandates a causal connection between the amount of the proposed exigent rate adjustment and the impact of the exigent circumstances on the Postal Service's finances. However, the Court concluded that "due to" has an additional, ambiguous meaning regarding the closeness of that causal connection—"that is, how much of the proposed adjustment must be due to the exigent circumstance"—which the Commission refers to in this Order as the "causal nexus of 'due to.'" 640 F.3d at 1267.

On July 11, 2011, the Court issued its mandate remanding the case to the Commission to determine "how closely the amount of the adjustments must match amount of the revenue lost as a result of the exigent circumstances." *Id.* at 1268. That same day, the Commission issued a notice and order promptly initiating this proceeding. Initial comments were filed by interested persons on July 25, 2011. Thereafter, two participants filed motions to strike portions of the Postal Service's initial comments. The Postal Service and another participant opposed the motions to strike. On July 29, 2011, the Commission issued an order clarifying the comment procedures by directing participants to limit their reply comments to the legal issue of how the causal nexus of "due to" should be interpreted. Reply comments were filed on August 1, 2011.

Most of the commenters urged the Commission to interpret "due to" to require a strict causal nexus. The Postal Service and one other commenter advocated a more relaxed interpretation of the causal nexus.

The Commission concludes that "due to" should be interpreted to require a close causal nexus. In particular, the Commission interprets the causal nexus of "due to" to mean that:

- (1) Exigent rate adjustments are permitted only if, and to the extent that, they compensate for the net adverse financial impact of the exigent circumstances;

- (2) To quantify the net adverse financial impact of the exigent circumstances, the Postal Service does not have to quantify such impact with absolute precision, but must:
 - (a) under the circumstances presented, justify its quantification through supportable methods commensurate with the amount of the proposed adjustment; and
 - (b) demonstrate that the amount of the proposed adjustment does not exceed the net adverse financial impact of the exigent circumstances.

The Commission's conclusions are based upon careful review of the language of section 3622(d)(1)(E); the purposes and policies of the Postal Accountability and Enhancement Act (PAEA); the roles of the price cap and section 3622(d)(1)(E) in the statutory scheme; the legislative history of the section 3622(d)(1)(E); the Court's opinion; and the comments. In considering all these factors, the Commission applies its expertise to interpret the causal nexus of "due to" as directed by the Court.

As preliminary matters, the Commission (1) reiterates its finding in Order No. 547 that the 2008-2009 recession and its impact on postal volumes constituted exigent circumstances; (2) defers ruling upon whether the Postal Service's exigent request meets the "reasonable and equitable and necessary" tests of section 3622(d)(1)(E); and (3) defers ruling on whether new materials cited by the Postal Service and one other participant can be relied upon.

In interpreting the causal nexus of "due to," the Commission reaffirms (1) its finding in Order No. 547 that the price cap is the cornerstone of the PAEA's ratemaking system and is intended to provide clear incentives for the Postal Service to improve efficiency and reduce its costs; (2) its finding in Order No. 547 that the section 3622(d)(1)(E) provides a narrow exception to the price cap under the PAEA's statutory scheme; and (3) its conclusion in Order No. 547 that the legislative history of the PAEA

supports the central role of the price cap and the role of the section 3622(d)(1)(E) as a narrow exception to it.

In addition, the Commission provides general guidance regarding the proof required to demonstrate the causal nexus of “due to.” This guidance is provided through a discussion of quantification requirements; the nature and amount of proof deemed necessary; supportable quantification methods; the requirement that the amount of the proposed adjustment does not exceed the net adverse financial impact of the exigent circumstances; and concerns regarding the administrative feasibility of requiring a close causal nexus.

Finally, the Commission prescribes further procedures for considering the Postal Service’s exigent request in light of the Commission’s interpretation of the causal nexus of “due to.”

II. BACKGROUND

A. Exigent Request Proceeding in Docket No. R2010-4

In December 2006, Congress enacted the PAEA that made significant changes to the process for setting postal rates.² The cornerstone of these changes was a price cap on rates for each market dominant class of mail, limiting increases to the rate of inflation.³

The PAEA provides an exception to the price cap commonly referred to as the “exigency” provision, which authorizes rate adjustments that exceed the price cap as a response to “either extraordinary or exceptional circumstances.”⁴ The exigency provision provides in relevant part as follows:

[R]ates may be adjusted on an expedited basis due to either extraordinary or exceptional circumstances, provided that the Commission determines, after notice and opportunity for public hearing and comment, and within 90 days after any request by the Postal Service, that such adjustment is reasonable and equitable and necessary to enable the Postal Service, under best practices of honest, efficient, and economical management, to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States.

39 U.S.C. § 3622(d)(1)(E).

² Pub L. No. 109-435, 120 Stat. 3198 (2006).

³ The price cap limits the percentage change in rates “to the change in the Consumer Price Index for All Urban Consumers....” 39 U.S.C. § 3622(d)(1)(A).

⁴ Requests to increase rates above the price cap under section 3622(d)(1)(E) are known as “exigent requests.” 39 CFR 3010.60. Although the term “exigent” does not appear in the PAEA, it was frequently used to describe the mechanism for increasing rates above the price cap. Order No. 547 at 13 n.12. For convenience, this Order refers to section 3622(d)(1)(E) as the “exigency provision,” rate adjustments under section 3622(d)(1)(E) as “exigent rate adjustments,” and proposed exigent rate adjustments as “proposed adjustments.”

On July 6, 2010, the Postal Service filed the first-ever exigent request.⁵ It sought to increase rates above the price cap for each market dominant class of mail. Exigent Request at 1, 9. The overall percentage increase proposed for all market dominant products was 5.6 percent. *Id.* at 15. The proposed net increase in annual contribution from the Exigent Request was approximately \$3 billion.⁶

The Postal Service alleged that it was entitled to an exigent rate adjustment because “extraordinary or exceptional circumstances” had occurred, and that the proposed adjustments were reasonable, equitable, and necessary. Exigent Request at 6-7, 17. The Postal Service provided statements from witnesses Corbett, Masse, and Kiefer to support its Exigent Request. *Id.* at 16.

As required by section 3622(d)(1)(E), the Commission reviewed the Exigent Request and conducted proceedings on an expedited basis. See 39 CFR 3010.64, 3010.66. The Commission held public hearings to question Postal Service witnesses regarding the Exigent Request. It also considered responses by the Postal Service to Presiding Officer’s information requests as well as initial and reply comments filed by interested persons.

B. Order No. 547

On September 30, 2010, the Commission issued Order No. 547, denying the Exigent Request under section 3622(d)(1)(E). Order No. 547 at 2, 87. The Commission thoroughly evaluated the purposes and policies of the PAEA; the roles of the price cap and exigency provision in the new system of rate regulation; and the legislative history of section 3622(d)(1)(E). *Id.* at 6-24. Based on this review, the Commission found that the price cap is the cornerstone of the modern system of

⁵ Docket No. R2010-4, Exigent Request of the United States Postal Service, July 6, 2010 (Exigent Request).

⁶ Docket No. R2010-4, Statement of Joseph Corbett on Behalf of the United States Postal Service, July 6, 2010, at 19.

ratemaking under the PAEA (*id.* at 38) and that the exigency provision was designed as a narrow exception to the price cap. *Id.* at 54, 56.

The Commission analyzed the text of section 3622(d)(1)(E) and concluded that it requires the Postal Service to demonstrate that:

- Either extraordinary or exceptional circumstances exist;
- The proposed adjustments are “due to” the extraordinary or exceptional circumstances; and
- The proposed adjustments are reasonable and equitable and necessary to enable the Postal Service, under best practices of honest, efficient, and economical management, to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States.⁷

A majority of the Commission found that the 2008-2009 recession and its impact on postal volumes qualified as exigent, or “extraordinary or exceptional,” circumstances.⁸ However, the Commission explained that exigent circumstances, by themselves, are not sufficient to justify exigent rate adjustments under section 3622(d)(1)(E). *Id.* at 53. To be authorized, proposed adjustments must be “due to” exigent circumstances and must meet the “reasonable and equitable and necessary” tests. *Id.* at 54.

The Commission interpreted the plain meaning of “due to” in section 3622(d)(1)(E) and concluded that a “proposed adjustment must be causally related to the alleged extraordinary or exceptional circumstance.” *Id.* This requirement is contained in the Commission’s rules, which state that an exigent request must explain

⁷ *Id.* at 54; see 640 F.3d at 1265-66 (quoting *id.*).

⁸ Order No. 547 at 3, 50. For convenience, “exigent circumstances” refers to “either extraordinary or exceptional circumstances” in section 3622(d)(1)(E).

“how both the requested overall increase, and the specific rate increases requested, *relate to* those [extraordinary or exceptional] circumstances[.]”⁹

The Commission denied the Exigent Request because the Postal Service did not demonstrate that its proposed adjustments were “due to” the exigent circumstances. Order No. 547 at 27. The Commission found that the Postal Service failed to show, as required by the Commission’s rules, how the proposed adjustments “relate to the extraordinary or exceptional circumstances that purportedly give rise to them.” *Id.* at 60. Instead, the Commission found that the proposed adjustments attempted to address long-term structural problems, including liquidity issues, not caused by the exigent circumstances. *Id.* at 3, 60.

Having found that the proposed adjustments had not been causally related to the exigent circumstances, it was unnecessary for the Commission to decide whether the adjustments were reasonable and equitable and necessary to enable the Postal Service, under best practices of honest, efficient, and economical management, to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States. *Id.* at 27 (paraphrasing 39 U.S.C. § 3622(d)(1)(E)).

C. Appellate Proceeding and Court’s Opinion

On October 22, 2010, the Postal Service appealed Order No. 547 to the United States Court of Appeals for the District of Columbia Circuit.¹⁰ In its opening brief, the Postal Service claimed that the Commission’s interpretation of “due to” imposed a “strict

⁹ See *id.* at 58, 60 (citing 39 CFR 3010.61(a)(3)) (emphasis added); 39 CFR 3010.6(a) (exigent requests are “authorized only when *justified by* exceptional or extraordinary circumstances.”) (emphasis added).

¹⁰ Petition for Review, *United States Postal Serv. v. Postal Regulatory Comm’n*, 640 F.3d 1263 (D.C. Cir. 2011) (No. 10-1343).

offset” test and that the Postal Service lacked adequate notice of this requirement.¹¹ In its response, the Commission asserted that it properly denied the Exigent Request because the Postal Service failed to relate the proposed adjustments to the exigent circumstances.¹² The Commission maintained that the Postal Service mischaracterized the Commission’s interpretation of “due to” and that the Postal Service had sufficient notice of the Commission’s interpretation. *Id.* at 18-19. A number of intervenors and *amici curiae* filed briefs supporting either the Postal Service or the Commission.¹³

On May 24, 2011, the Court issued its opinion in *United States Postal Service v. Postal Regulatory Commission*, 640 F.3d 1263 (D.C. Cir. 2011). The Court denied in part and granted in part the Postal Service’s petition for review of Order No. 547. *Id.* at 1268. The Court affirmed the Commission’s interpretation “that the plain meaning of ‘due to’ [in section 3622(d)(1)(E)] mandates a causal relationship between the amount of a requested adjustment and the exigent circumstances’ impact on the Postal Service.” *Id.* at 1267. The Court confirmed that, “under the plain meaning of the statutory language, a rate may be ‘adjusted on an expedited basis’ only *because of* ‘extraordinary or exceptional circumstances.’” *Id.* (emphasis in original).

The Court nevertheless concluded that the plain meaning of “due to” does not adequately express how close the relationship between the proposed adjustments and the exigent circumstances must be. *Id.* at 1267-68. In the Court’s view, “due to” in

¹¹ Opening Brief of Petitioner United States Postal Service at 19, 24, *United States Postal Serv. v. Postal Regulatory Comm’n*, 640 F.3d 1263 (D.C. Cir. 2011) (No. 10-1343) (Postal Service Opening Brief).

¹² Brief for Respondent Postal Regulatory Commission at 17, *United States Postal Serv. v. Postal Regulatory Comm’n*, 640 F.3d 1263 (D.C. Cir. 2011) (No. 10-1343).

¹³ These persons include Senator Collins, the National Postal Mail Handlers Union, the National Association of Letter Carriers, AFL-CIO, and a group comprising the Affordable Mail Alliance and other organizations.

section 3622(d)(1)(E) is also ambiguous because the phrase can mean “due *in part* to” as well as “due *only* to.”¹⁴

Because “due to” has an additional, ambiguous meaning, the Court held that the Commission could not properly reject the Exigent Request based on a plain meaning interpretation of the phrase.¹⁵ The Court therefore remanded the case to the Commission to “exercise its discretion to construe the ambiguous language of section [3622(d)(1)(E)], explaining the extent of causation the Commission requires the Postal Service to demonstrate between the exigent circumstance’s impact on Postal Service finances and the proposed rate increase.” *Id.* at 1264. Because “Congress expressly delegated to the Commission responsibility to implement section [3622(d)(1)(E)]” (*id.* at 1266), the Court directed the Commission “to fill the statutory gap by determining how closely the amount of the adjustments must match the amount of the revenue lost as a result of the exigent circumstances.” *Id.* at 1268.

This Order refers to the closeness of the causal connection between the amount of the proposed adjustment and the impact of the exigent circumstances on the Postal Service’s finances as the “causal nexus of ‘due to.’”

D. Procedures on Remand

On July 11, 2011, the Court issued its mandate remanding the case to the Commission. That same day, the Commission issued a notice and order to promptly initiate this proceeding.¹⁶ Order No. 757 provided interested persons the opportunity to express their views on the causal nexus of “due to” in PAEA section 3622(d)(1)(E). *Id.*

¹⁴ *Id.* at 1268 (emphasis in original). The Court stated that “although [‘due to’] has a plain meaning regarding causal connection *vel non*,...it has no similar plain meaning regarding the closeness of the causal connection.” *Id.*

¹⁵ *Id.* The Court rejected the Commission’s plain meaning interpretation of “due to” “as requiring that the Postal Service match the amount of the proposed adjustments *precisely* to the amount of revenue lost as a result of the exigent circumstances.” *Id.* (emphasis in original).

¹⁶ Notice and Order Establishing Procedures on Remand, July 11, 2011 (Order No. 757).

at 4. Initial comments were due on July 25, 2011, and reply comments were due on August 1, 2011. *Id.*

The Commission received eight initial comments and seven reply comments, which are identified in the Appendix.¹⁷ All of the comments propose interpretations of the causal nexus of “due to.” Some comments also address other issues. The Postal Service applies its proposed interpretation in an effort to quantify the impact of the exigent circumstances on its finances. Postal Service Comments at 2-3, 24-53.

In response, the Public Representative and ANM, et al. filed motions to strike portions of the Postal Service’s initial comments on several grounds, alleging that those portions exceeded the scope of the comments requested by Order No. 757.¹⁸ Both the Postal Service and APWU filed answers opposing the PR Motion to Strike.¹⁹ The Postal Service also opposed the ANM, et al. Motion to Strike.²⁰

On July 28, 2011, Vice Chairman Mark Acton was designated as Presiding Officer in this proceeding.²¹ On July 29, 2011, the Commission issued an order clarifying the comment procedures previously established by Order No. 757.²² The Commission directed participants to limit their reply comments to the legal issue of

¹⁷ APWU filed a Motion for Late Acceptance of [Initial] Comments of American Postal Workers Union, AFL-CIO, July 26, 2011. The motion is granted.

¹⁸ Public Representative Motion to Strike Portions of the Postal Service’s Initial Comments or for Alternative Relief, July 26, 2011, at 1 (PR Motion to Strike); Motion to Strike of Alliance of Nonprofit Mailers, Association for Postal Commerce, Direct Marketing Association and Magazine Publishers of America, Inc., July 27, 2011, at 1-2 (ANM, et al. Motion to Strike) (together, Motions to Strike).

¹⁹ Opposition of the United States Postal Service to Public Representative’s Motion to Strike or for Alternative Relief, July 26, 2011 (Postal Service Opposition to PR Motion to Strike); Opposition of American Postal Workers Union, AFL-CIO to Public Representative’s Motion to Strike or for Alternative Relief, July 27, 2011.

²⁰ Opposition of the United States Postal Service to ANM, PostCom, DMA, and MPA Motion to Strike, August 3, 2011 (Postal Service Opposition to ANM, et al. Motion to Strike).

²¹ Notice of the Chairman Designating Presiding Officer, July 28, 2011.

²² Order Clarifying Comment Procedures, July 29, 2011 (Order No. 781).

interpreting the causal nexus of “due to.” *Id.* at 4. It stated that matters raised by the Motions to Strike would be addressed in a future order. *Id.*

III. COMMENTS

The comments address a number of areas, including (1) the proper reading of the Court's opinion; (2) the Commission's authority and responsibility on remand; (3) the appropriate procedures to follow on remand; (4) the significance and adequacy of the record developed during the earlier Commission proceedings; (5) the proper interpretation of the exigency provision, including the purposes and policies of the PAEA as well as the legislative history of the price cap and the exigency provision; and (6) the degree of support required to demonstrate the causal nexus of "due to." Each commenter offers its own interpretation of "due to" and urges the Commission to accept its recommendations.

The comments and the proposed formulations are helpful in identifying and analyzing relevant factors that bear upon an interpretation of the causal nexus of "due to." The Commission takes the comments into consideration in its analysis in Section IV. below.

A. Initial Comments

1. United States Postal Service

The Postal Service addresses essentially two subjects in its initial comments. First, it discusses the Court's opinion and proposes its interpretation of the causal nexus of "due to." Postal Service Comments at 1-2, 3-24. Second, the Postal Service discusses "how, under any 'due to' causality standard that might reasonably be promulgated by the Commission, the Postal Service is entitled to an exigent increase...." *Id.* at 2, 24-60.

The Postal Service's comments begin with its summary of the Court's opinion. *Id.* at 3-5. Based upon its reading of the Court's opinion—as well as the statutory text, the policies underlying the PAEA, and its reading of the Commission's appellate brief—the Postal Service asserts that "the Commission should interpret the 'due to'

requirement as setting forth a standard of general proportionality between the size of a requested increase and the impact of the exigent circumstances on the Postal Service.” *Id.* at 1, 6.

The Postal Service supports its position by arguing that (1) a strict offset approach is inconsistent with the Commission’s representations to the Court and with the Court’s opinion (*id.* at 6-7); (2) the Commission must interpret the statute in a balanced fashion (*id.* at 7-12); (3) a pragmatic, flexible approach is most consistent with the policies underlying the PAEA and with the Commission’s regulations (*id.* at 12-13); (4) a strict proportionality standard is unnecessary to ensure adherence to the efficiency incentives of the price cap (*id.* at 14); and (5) a general proportionality standard is more administratively feasible than a strict proportionality standard (*id.* at 14-16).

Finally, the Postal Service asserts that the Commission cannot reject an exigent request simply because the Postal Service’s financial crisis is due to multiple factors, or because the proposed adjustments do not completely resolve the entire crisis. *Id.* at 16-24.

2. Alliance of Nonprofit Mailers, Association for Postal Commerce, Direct Marketing Association, Inc., and Magazine Publishers of America, Inc.

ANM, et al. argue that the scope of the remanded proceeding is narrow and that the limited purpose of the Court’s remand is for the Commission to address the issue of “[w]here on the spectrum of causation standards the ‘due to’ requirement of Section [3622(d)(1)(E)] should be placed....” ANM, et al. Comments at 1-2. ANM, et al. take the position that the Commission “should establish a strict causation standard....” *Id.* at 3. They base their position on “the policies of the Act, the record before the Commission, and the Commission’s specific findings in Order No. 547....” *Id.* According to ANM, et al., those considerations “require the Postal Service to have shown in its initial request for an exigent rate increase that the recession was the primary or ‘efficient’ cause of the Postal Service’s financial shortfall.” *Id.* (footnote

omitted). ANM, et al. analogize their proposed “primary or efficient cause” standard to the proximate causation standard used in tort law and to the concepts of “efficient cause” or “efficient proximate cause” used in insurance coverage litigation. *Id.* at 11-12. Finally, ANM, et al. assert that the evidentiary record in this proceeding warrants denying the Exigent Request regardless of the Commission’s interpretation of the causal nexus of “due to.” *Id.* at 3, 14.

3. American Postal Workers Union

APWU urges the Commission to interpret the causal nexus of “due to” with reference to the instant case “without seeking to establish a broad rule applicable to all exigency cases.” APWU Comments at 2. It makes this suggestion in order to obtain immediate relief for the Postal Service and to avoid the pitfalls it claims would be associated with any attempt to establish a causation standard “in the abstract.” *Id.* Notwithstanding this suggestion, APWU recognizes that the Commission should provide guidance on what is expected in future exigent requests. *Id.*

With respect to the causal nexus of “due to,” APWU argues that the Commission should “reject a strict ‘due only to’ causation standard” because it “would eviscerate the exigency exception....” *Id.* at 3. Instead, APWU recommends that the Commission “require a weak causative connection....” *Id.* at 5. It asserts that a weak causal nexus will not allow unrestricted rate increases because of the additional requirement in section 3622(d)(1)(E) that exigent rate adjustments be “reasonable, equitable and necessary.” *Id.* Because APWU believes that the Postal Service has already satisfied the weak standard and because the Postal Service faces an imminent liquidity crisis, APWU suggests that the Commission move quickly to implement the full 5.6 percent exigent rate adjustment originally requested by the Postal Service. *Id.*

4. Senator Susan Collins

Senator Collins contends that the Commission should “rely on Congress’s intent behind the underlying purpose of the inflation-based rate cap” in “determining the standard for the causation requirement....” Senator Collins Comments at 2. That intent, Senator Collins states, is “to incentivize the Postal Service to improve its business model and realize maximum efficiencies and cost savings.” *Id.* at 1. In order to do that, Senator Collins argues that the Commission should apply a strict standard that requires the Postal Service to demonstrate “a distinct and close nexus” between the proposed adjustments and the exigent circumstances. *Id.* at 1-2.

Senator Collins recommends that to be consistent with the purposes of the PAEA, the Commission should recognize that the only valid exigent rate adjustments are those “when the exigent circumstance...is the only significant cause of the proposed rate increase.” *Id.* at 1. Senator Collins asserts that such a “strict standard” should be used to ensure that exigent rate adjustments “are quantitatively, demonstrably, and causally linked to the exigent circumstances.” *Id.* at 2. This interpretation is, in Senator Collins’s view, buttressed by the additional requirement in section 3622(d)(1)(E) that exigent rate adjustments be “reasonable and equitable and necessary.” *Id.*

5. Greeting Card Association

GCA addresses a range of subjects, including (1) the scope of the Court’s remand (GCA Comments at 2-8); (2) the requirement that an exigent rate adjustment be “reasonable, equitable, and necessary” (*id.* at 8-10); (3) the mail volume effects of the 2008-2009 recession on different mail classes (*id.* at 10-12); (4) whether the 2008-2009 recession qualifies as exigent circumstances (*id.* at 13-15); and (5) the appropriateness of the Postal Service’s proposed distribution of revenue increments among mail classes (*id.* at 15-19). Accompanying GCA’s initial comments is a 38-page Detailed Analysis that presents new materials on “the question of whether the 2008-2009 recession caused exceptional or exigent declines in the overall mail volume, and to what extent all

the volume declines were caused by long run Internet diversion, or by short run recessionary factors by major postal product.” Detailed Analysis at 1.

With respect to the Court’s remand and the Commission’s task of interpreting the causal nexus of “due to,” GCA asserts that the Commission can exercise “very wide discretion” and “is free within very broad limits to define the causal relationship....” GCA Comments at 2, 7. GCA contends that the Commission has the option of reaching the same conclusion as it did in Order No. 547, “if analysis convinces [the Commission] that Congress meant ‘due to,’ in this statutory context, to be given the strict reading.” *Id.* at 4.

GCA urges that “the causal relationship between the exigency and the revenue request must be quantitative as well as qualitative” and that the amount of extra revenue requested by the Postal Service must “bear a reasonably close relationship to the amount of financial damage caused by the exigent event(s)[.]” *Id.* at 3. GCA characterizes this “reasonably close relationship” as “a substantial *quantitative* equality” that must exist between the incremental revenue requested and the financial damage resulting from the exigent circumstances. *Id.* at 7 (emphasis in original).

Finally, GCA argues that the Commission “should consider itself free to subdivide a request by reference to these relationships to demonstrated exigent events and their demonstrated financial consequences, and to approve parts and reject parts on that basis.” *Id.*

6. Saturation Mailers Coalition and Valassis Direct Mail, Inc.

SMC/VDM assert that the Court remanded a narrow issue of statutory interpretation without concluding that the Commission’s prior interpretation was impermissible and without giving the Commission any direction regarding how it should interpret the causal nexus of “due to.” SMC/VDM Comments at 1-2. SMC/VDM argue that “taking into account the overall structure and intent of the [PAEA]...the only

reasonable and practicable interpretation that makes sense within the context of the PAEA is that the amounts sought by the Postal Service must be limited to that ‘due *solely* to’ the exigent circumstance.” *Id.* at 3 (emphasis in original). SMC/VDM concede that “[a]ny estimates of economic impact will necessarily involve some imprecision.” *Id.* at 5. They nevertheless argue that the Postal Service “must provide a reasonable and supported estimate of the actual financial harm caused solely by the exigent circumstance, factoring out the impacts of other non-exigent conditions.” *Id.*

7. Time Warner Inc.

Time Warner takes essentially three positions. First, it addresses the proper function of the Commission and the Court under *Chevron*, urging the Commission to exercise its prerogative on remand to resolve the statutory ambiguity identified in the Court’s opinion and to carefully distinguish between the Court’s holding and those portions of Court’s opinion that, in Time Warner’s view, are mere *dicta*.²³ Second, it argues that the causal relationship between the exigent circumstances and proposed adjustments “must be primary or predominant, although not necessarily exclusive[.]” *Id.* at 3, 26. Third, Time Warner asserts that “all of the rate adjustments, with only *de minimus* exceptions, must be due to the exigent circumstances.” *Id.*

8. Public Representative

The Public Representative contends the Commission has “wide latitude” on remand to interpret the causal nexus of “due to” and that during this phase of the proceeding, it is the Commission that has the sole authority to issue that interpretation. PR Comments at 2.

The Public Representative’s preferred procedural option for resolving the proceedings in the instant docket is for the Commission to (1) deny the Exigent Request

²³ TW Comments at 9-23; see *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

on the grounds that the Postal Service's original case failed to demonstrate any causal relationship between the exigent circumstances and the proposed adjustments; and (2) initiate a new rulemaking proceeding to consider the causal nexus of "due to." *Id.* at 7-8.

With respect to the merits of his interpretation, the Public Representative begins by analyzing the principal cases cited by the Court in its opinion. *Id.* at 9-12. Based upon his analysis of *Adams v. Director, OWCP*, 886 F.2d 818 (6th Cir. 1989), the Public Representative discusses three potential interpretations of "due to." *Id.* at 11-18. Two examples are what the Public Representative characterizes as "relaxed" interpretations. *Id.* at 13-16. The third example is more demanding. *Id.* at 17-18. The Public Representative explains that together, these examples define a continuum "from minimal causation generating financial recovery significantly in excess of the exigent circumstance, to direct causation only allowing recovery for the specific exigent circumstance." *Id.* at 16. The Public Representative contends that the more relaxed interpretations should be rejected and urges the Commission to establish a standard "which allows for a level of financial recovery of no more than can be shown to be directly caused by the exigent circumstance." *Id.* at 17 (footnote omitted).

B. Reply Comments

1. United States Postal Service

The Postal Service asserts that the initial comments of GCA, SMC/VDM, APWU, and the Public Representative present interpretations of the causal nexus of "due to" that are generally comparable to the Postal Service's own interpretation. Postal Service Reply Comments at 2-5. By that, the Postal Service means that "there must be proportionality between the size of the requested increase and the impact of the exigent circumstances on the Postal Service." *Id.* at 2.

By contrast, the Postal Service urges the Commission to reject ANM, et al.'s interpretation of "due to." *Id.* at 5-11. In the Postal Service's view, ANM, et al.'s interpretation "fundamentally misconstrues the question posed by the 'due to' clause" by precluding the Postal Service from obtaining an exigent rate adjustment if the losses from the exigent circumstances "are not the 'primary' cause of the Postal Service's *entire financial shortfall.*" *Id.* at 6 (emphasis in original).

Although it considers the Public Representative's position regarding the interpretation of "due to" to be comparable to its own, the Postal Service takes issue with the Public Representative's suggestion that the Commission should "'repeat and expand' on its [prior] finding that 'no causal relationship exists between the cited exigent circumstances and the exigent Request and bring this docket to a rapid conclusion.'" *Id.* at 11 (citing PR Comments at 19). According to the Postal Service, it established a causal connection between the proposed adjustments and the exigent circumstances that prompted its Exigent Request. Postal Service Reply Comments at 12. In the Postal Service's view, it was the Commission's "recasting of the exigent circumstance" in Order No. 547 that effectively denied the Postal Service the opportunity to demonstrate the causal relationship between its proposed adjustments and the exigent circumstances found by the Commission to have occurred. *Id.* at 13. From this perspective, the Postal Service views these proceedings on remand to be the first opportunity for it to demonstrate the requisite causal nexus between the proposed adjustments and the exigent circumstances. *Id.*

The Postal Service also opposes the Public Representative's suggestion that a new rulemaking proceeding should be instituted to determine the causal nexus of "due to." *Id.* at 11-12. The Postal Service's position is that the Commission has a duty in these proceedings to interpret the causal nexus of "due to" and to apply that interpretation to the Exigent Request. *Id.* at 12.

Notwithstanding the similarity it sees between its proposed interpretation and the one advocated by GCA, the Postal Service takes issue with GCA's claims regarding the absence of exigent circumstances as untimely and incorrect.²⁴

Finally, the Postal Service responds to the initial comments of Time Warner by asserting that it has adopted a "radical approach" that is inconsistent with the Court's opinion and is based on a misunderstanding of appellate procedure and the respective roles of the Commission and the Court. *Id.* at 39. The Postal Service urges the Commission to ignore Time Warner's suggestion that much of the Court's opinion consists of *dicta* and challenges as incorrect the assertion by Time Warner that the Court's opinion erroneously conflated two issues. *Id.* at 41-42.

2. Public Representative

The Public Representative responds to two aspects of the Postal Service's initial comments. First, the Public Representative addresses the Postal Service's interpretation of the Court's opinion by maintaining that the Court has no authority to prejudge how the Commission should interpret the causal nexus of "due to" on remand and that the Commission remains free to adopt any interpretation that is based upon a permissible construction of the statute. PR Reply Comments at 2. The Public Representative contends that the Commission could even adopt "the strict nexus or offset test" questioned by the Court in its opinion. *Id.* Second, the Public Representative criticizes the Postal Service's proposed interpretation of the causal nexus of "due to" as "totally subjective" and contrary to congressional intent. *Id.* at 3.

In response to APWU's argument regarding the significance for this proceeding of the *Adams* decision, the Public Representative notes the position expressed in his

²⁴ *Id.* at 18-26. The Postal Service also disputes GCA's claims that the recession had no effect on the volume of First-Class Mail (*id.* at 26-37) and with GCA's attempt to question whether rate increases for First-Class Mail are reasonable, equitable, and necessary. *Id.* at 37-39. Both GCA's comments on those issues and the Postal Service's responses in its reply comments go beyond the scope of the issues addressed by this Order. See Section IV.B.2 below.

initial comments that *Adams* is inapplicable. *Id.* at 4. The Public Representative also disagrees with APWU's contention that the Postal Service's financial difficulties make it too complicated to estimate the financial impact of the exigent circumstances. *Id.* Finally, the Public Representative argues that the causal nexus is capable of being interpreted in a manner applicable to present and future exigent requests. *Id.* at 5.

The Public Representative also disputes GCA's contention that a causal relationship must be shown between the exigent circumstances and the proposed adjustments at the class or category level. *Id.* (footnote omitted). In the Public Representative's view, GCA provides no credible support for that position, and none exists. *Id.* at 5-6. He contends that, at most, such a relationship would fall under an analysis of what is "equitable" under the "reasonable and equitable and necessary" requirements of the exigency provision. *Id.*

With respect to the remaining initial comments, the Public Representative expresses general agreement with the comments of SMC/VDM (*id.* at 6); states his belief that the comments of Time Warner are informative and should be considered (*id.*); agrees with ANM, et al. that the Commission must first address the causal nexus issue before reconsidering the Exigent Request (*id.* at 7); and asserts that the comments of Senator Collins are consistent with his position (*id.* at 8).

3. Other Replies to the Postal Service

Other reply comments respond to the initial comments of the Postal Service and reaffirm each commenter's interpretation of the causal nexus of "due to."

ANM, et al. allege that the Postal Service has mischaracterized the Court's holding and portray the Postal Service's position as an attempt to revive its appellate argument, rejected by the Court, that the "reasonable and equitable and necessary" clause and the "objectives" of section 3622(b) trump the causality requirement of "due

to.” ANM, et al. Reply Comments at 2, 12-19. ANM, et al. reaffirm support for its requirement of “proximate or economic causation.” *Id.* at 1.

GCA alleges that the Postal Service has misidentified the volume loss it experienced as the exigent circumstances in this case. GCA Reply Comments at 2-11. According to GCA, “[i]f the exigency is misidentified, any resulting rate adjustments will not be ‘due to’ the actually ‘extraordinary or exceptional circumstances’ contemplated by Congress.” *Id.* at 2. GCA then attacks the Postal Service’s four alternative proposals for quantifying the impact of its volume loss. *Id.* at 11-14. Accompanying GCA’s reply comments is a second detailed analysis. See Detailed Analysis – Reply Comments.

MMA/NPPC assert that “the amount of an above-cap exigent increase must be limited to that caused solely by the extraordinary or exceptional circumstance[.]” MMA/NPPC Reply Comments at 1.²⁵ In that connection, they agree with interpretations of the causal nexus of “due to” advanced by other commenters, including SMC/VDM and the Public Representative, as “most consistent with the PAEA’s structure and intent and that supports the primary role Congress assigned to the rate cap.” *Id.* at 2. MMA/NPPC also agree that the narrow construction of the “due to” clause advocated by Senator Collins “would best implement the Congressional intent.” *Id.* They oppose what they view as the Postal Service’s attempt in its initial comments to use the “reasonable and equitable and necessary” clause as a means of increasing the size of an exigent rate adjustment under the “due to” standard. *Id.* at 5-6.

SMC/VDM challenge the Postal Service’s reading of both section 3622(d)(1)(E) and the Court’s opinion as “expansive and incorrect.” SMC/VDM Reply Comments at 1. They attack the Postal Service’s “general proportionality” causation standard as “overly

²⁵ On August 1, 2011, MMA/NPPC filed “Comments of the Major Mailers Association and the National Postal Policy Council.” The Commission considers this filing as part of the reply comments in this proceeding as MMA/NPPC stated that it was “reply[ing] to the opening comments in this proceeding....” MMA/NPPC Reply Comments at 1. Furthermore, MMA/NPPC did not provide initial comments, and submitted its filing on the date reply comments were due. MMA/NPPC comments filed on August 1, 2011 will be hereinafter cited as MMA/NPPC Reply Comments.

vague and loose” and reject the Postal Service’s contention that the “reasonable and equitable and necessary” clause in section 3622(d)(1)(E) “sets a benchmark for the allowable level of an exigency rate increase.” *Id.* at 4. According to SMC/VDM, “[t]he only benchmark is the financial impact of the exigent circumstance by itself.” *Id.* They argue that, while a precise match between the proposed adjustments and the impact of the exigent circumstances is not required, “a reasonable estimate of the actual financial harm” is required. *Id.*

Time Warner opposes the “general proportionality” standard advocated by the Postal Service as erroneously based upon *dicta* in the Court’s opinion. TW Reply Comments at 1.

IV. COMMISSION ANALYSIS

A. Summary of the Commission's Interpretation

The Commission has evaluated the comments in this proceeding in light of the Court's instructions and applied established methods of statutory interpretation in its analysis. Based on this evaluation, the Commission interprets the causal nexus of "due to" in section 3622(d)(1)(E) to mean that exigent rate adjustments are permitted only if, and to the extent that, they compensate for the net adverse financial impact of the exigent circumstances.²⁶ To meet this requirement, the Postal Service must:

(1) Quantify the net adverse financial impact of the exigent circumstances. The Postal Service is not required to quantify the net adverse financial impact of the exigent circumstances with absolute precision. The nature and amount of proof required to support the quantification will vary depending upon the circumstances presented, but the quantification must be justified through supportable methods commensurate with the amount of the proposed adjustment; and

(2) Demonstrate that the amount of the proposed adjustment does not exceed the net adverse financial impact of the exigent circumstances.

B. The Commission's Task on Remand

As the Court explained, the Commission's task on remand is to interpret the ambiguous language of "due to" in section 3622(d)(1)(E), "explaining the extent of causation the Commission requires the Postal Service to demonstrate between the exigent circumstance's impact on Postal Service finances and the proposed rate increase." *Id.* at 1264. The Commission resolves this ambiguity by exercising the authority expressly delegated to it by Congress to implement section 3622(d)(1)(E). *Id.* at 1266. It fulfills its responsibility to interpret the causal nexus of "due to" by

²⁶ "Financial impact of the exigent circumstances" means the impact of the exigent circumstances on the Postal Service's finances. See 640 F.3d at 1264, 1267.

determining “how closely the amount of the adjustments must match the amount of the revenue lost as a result of the exigent circumstances.” *Id.* at 1268.

1. Views of the Commenters

To varying degrees, most commenters address the Commission’s role on remand and the extent of its authority to determine, in the first instance, the appropriate causal nexus of “due to.”²⁷ Some commenters assert that the Commission possesses broad discretion to interpret the causal nexus. *E.g.*, ANM, et al. Reply Comments at 4. Other commenters argue that the Commission is free, on remand, to confirm its original interpretation in Order No. 547 of the causal nexus of “due to,” provided it goes beyond plain meaning and exercises its regulatory expertise. *E.g.*, GCA Comments at 4; PR Comments at 11. Still other commenters emphasize that the Commission’s authority to determine the causal nexus of “due to” in the first instance cannot be predetermined by the Court that ordered the remand. *E.g.*, PR Comments at 11; TW Comments at 4-5, 15-18.

Of all the commenters, Time Warner devotes the most attention to the Commission’s role and authority on remand. TW Comments at 9-23. Time Warner argues that the Commission should take a “fresh look” at the causal nexus issue on remand. *Id.* at 2. Time Warner asserts further that although *Chevron* establishes the framework for the Commission’s determination of the causal nexus of “due to” on remand, it does not control the interpretation itself. *Id.* at 9-10. Time Warner asserts that the Commission, as the expert regulatory agency, can override any attempt by the Court to predetermine the outcome of the Commission’s action on remand. *Id.* at 5. In addition, Time Warner urges the Commission to reformulate the issues remanded by the Court because it believes the Court has conflated two distinct issues in ordering a

²⁷ Postal Service Comments at 3-5; Postal Service Reply Comments at 39-42; ANM, et al. Comments at 2; ANM, et al. Reply Comments at 4, 8-12; APWU Comments at 3; GCA Comments at 2-7; MMA/NPPC Reply Comments at 1-2; SMC/VDM Comments at 1-3; SMC/VDM Reply Comments at 1-2; TW Comments at 9-23; PR Comments at 4-6, 9-11; and PR Reply Comments at 2, 6.

remand. *Id.* at 18-20. Finally, Time Warner contends that the Commission should act without regard for passages in the Court's opinion that Time Warner argues are non-binding *dicta*. *Id.* at 5-9, 21-23.

The Postal Service vigorously opposes the arguments presented by Time Warner. Postal Service Reply Comments at 39-42. The Postal Service alleges that Time Warner has adopted a "radical approach" that misunderstands appellate procedure and the respective roles of the Commission and the Court. *Id.* at 39. In particular, the Postal Service asserts that both of Time Warner's suggestions that the Commission reformulate the Court's remand order and that the Commission ignore much of the Court's opinion as *dicta* are misplaced. *Id.* at 41. In that connection, the Postal Service disagrees with Time Warner's assertion that the Court has erroneously conflated two issues. *Id.* at 42.

The Court ruled that because of the ambiguity regarding the causal nexus of "due to," "the Commission was bound to proceed to *Chevron* step 2 to fill the statutory gap by determining how closely the amount of the adjustments must match the amount of the revenues lost as a result of the exigent circumstances." 640 F.3d at 1268. Under *Chevron*, an agency's interpretation of ambiguous language is binding on an appellate court as long as that determination is reasonable. 467 U.S. at 843-44. The Commission interprets the Court's opinion as consistent with the established principles discussed in *Chevron*. See 640 F.3d at 1266 ("Under *Chevron* step 2, 'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.'") (citation omitted).

Based on the Court's opinion and the cases it relies upon, the Commission concludes that, as the agency responsible for administering the exigency provision, the Commission possesses broad authority on remand to interpret the causal nexus of "due to." See *id.* at 1264, 1266, 1268. However, the Commission is mindful that the exercise of that authority is not occurring in a vacuum. It is occurring in response to the Court's

remand and the opinion underlying that remand. While, in general, Time Warner may be correct in asserting that the Commission has the authority to override an attempt by a reviewing court to predetermine a Commission interpretation of ambiguous language, the Commission is not persuaded that such a case is presented here. The Commission interprets the Court's opinion as acknowledging the Commission's authority to interpret ambiguities inherent in the causal nexus of "due to." See *id.*; *City of Cleveland v. Fed. Power Comm'n*, 561 F.2d 344, 346-48 (D.C. Cir. 1977).

In carrying out its responsibilities on remand, the Commission is drawing upon the expertise developed through its experience regulating postal rates for more than 40 years. That experience began with the passage of the Postal Reorganization Act of 1970.²⁸ Since 2006, the Commission has been the agency responsible for implementing the new regulatory paradigm adopted by the PAEA, which contains the exigency provision. See 39 U.S.C. § 3622(a).

2. Scope of the Remand Proceeding

In this Order, the Commission addresses only the legal issue specifically remanded by the Court, the causal nexus of "due to." Some comments raise issues that do not directly relate to the legal question remanded by the Court. They include questions regarding the existence and nature of the exigent circumstances; issues regarding application of the "reasonable and equitable and necessary" tests; and questions concerning the evidentiary status of new materials that are not part of the record previously developed. Because these issues fall outside the scope of Order No. 757, the Commission does not resolve them in this Order.

²⁸ Pub L. No. 91-375, 84 Stat. 719 (1970).

a. Existence and Nature of the Exigent Circumstances

Two commenters dispute the existence or nature of the exigent circumstances. GCA alleges that the 2008-2009 recession does not qualify as exigent circumstances. GCA Comments at 13. The Postal Service contends that in its Exigent Request, it identified the exigent circumstances as the overall drop in mail volume between FY 2006 and FY 2009 rather than only the decline in volume caused by the recent recession. Postal Service Comments at 25-30.

The Commission reiterates its finding in Order No. 547 that the 2008-2009 recession and its impact on postal volumes constituted exigent circumstances and that it was those exigent circumstances that authorized the Exigent Request. Order No. 547 at 3, 50. The Court did not overturn this finding, and the Commission will not relitigate that issue in this proceeding.

b. “Reasonable and Equitable and Necessary” Tests

Some participants comment on the “reasonable and equitable and necessary” tests in section 3622(d)(1)(E), which require exigent rate adjustments to be “reasonable and equitable and necessary to enable the Postal Service, under best practices of honest, efficient, and economical management, to maintain and continue development of postal services of the kind and quality adapted to the needs of the United States.”

In its comments, GCA proposes its interpretation of the “reasonable and equitable and necessary” tests. GCA Comments at 8-10, 15-17. Similarly, after applying its proposed interpretation of the causal nexus of “due to,” the Postal Service argues that the proposed adjustments are reasonable, equitable, and necessary. Postal Service Comments at 53-60. The Postal Service also contends that based on the Commission’s findings in Order No. 547, the issue of whether the Postal Service practiced “honest, efficient, and economical management” may not be revisited on remand. *Id.* at 57 (citing Order No. 547 at 61 n.48, 68, 80).

The Commission denied the Exigent Request because the Postal Service failed to show that the proposed adjustments were “due to” the exigent circumstances. Order No. 547 at 27. Thus, it was unnecessary for the Commission to determine whether the proposed adjustments met the “reasonable and equitable and necessary” tests, which include the “best practices of honest, efficient, and economical management” standard in section 3622(d)(1)(E). *Id.* While these issues may yet arise after further procedures, as described below in Section V, there is no need for the Commission to address these issues in this Order to comply with the Court’s remand.

c. New Materials

Both the Postal Service and GCA submit or rely upon new materials that are not part of the record on which Order No. 547 was premised. The Postal Service provides four alternative methods of quantifying the harm from the exigent circumstances to support its proposed interpretation of the causal nexus of “due to.” Postal Service Comments at 30-53. These materials are the subject of the Motions to Strike described in Section II.D above. Similarly, GCA provides new materials, including two detailed analyses, that purport to demonstrate that the 2008-2009 recession had no significant effect on First-Class Mail volume. GCA Comments at 10-12; GCA Reply Comments at 14.

Consideration of these materials is premature. The Commission must first issue its interpretation of the causal nexus of “due to.” See Postal Service Opposition to ANM, et al. Motion to Strike at 2 (stating that the Commission must evaluate the Exigent Request “*after* it correctly interprets the statute and determines the proper standard to apply....”) (emphasis in original); PR Reply Comments at 7.

C. The Commission’s Interpretation of the Causal Nexus of “Due to”

In Order No. 547, the Commission summarized basic and well-established steps traditionally used by courts and regulatory agencies to interpret statutory language.

Order No. 547 at 24-26. These methods involve reviewing the ordinary or plain meaning of a relevant term, and when necessary, the structure and purpose of the operative law as well as potentially relevant legislative history.²⁹ The Commission applied those traditional steps to the exigency provision and concluded “that the plain meaning of section 3622(d)(1)(E) is both clear, and an accurate reflection of Congressional intent” and that the “plain meaning provides the basis for the Commission’s decision.” Order No. 547 at 27.

The Court did not fault the Commission for following traditional methods of statutory interpretation. Rather, the Court ruled that “due to” has an additional, ambiguous meaning regarding the causal nexus between the amount of the proposed adjustment and the impact of the exigent circumstances on the Postal Service’s finances. Therefore, the Court directed the Commission to exercise its authority and discretion to resolve this ambiguity.

Accordingly, in this Order, the Commission again follows the traditional methods of statutory interpretation previously summarized in Order No. 547. However, as directed by the Court, the Commission proceeds beyond the plain meaning of the words “due to” to interpret the causal nexus. In doing so, the Commission considers (1) the language of section 3622(d)(1)(E); (2) the purposes and policies of the PAEA; (3) the roles of the price cap and exigency provision in the statutory scheme; (4) the legislative history of section 3622(d)(1)(E); (5) the Court’s opinion; and (6) the comments. In considering all these factors, the Commission applies its expertise to interpret the causal nexus of “due to” as directed by the Court.

In Order No. 547, the Commission examined several of these areas in depth, including the primary purposes and development of the PAEA (*id.* at 6-7), the

²⁹ *Id.* The PAEA, as enacted, does not have any conference or committee reports. The purposes and policies of the PAEA, and much of its legislative history, are explained in committee reports to the PAEA’s predecessor bills in the House and Senate. See H.R. Rep. No. 109-66, pt. 1 (2005) (House Report); S. Rep. No. 108-318 (2004) (Senate Report).

importance of the price cap and the role of the exigency provision (*id.* at 10-14), and the legislative history of section 3622(d)(1)(E) (*id.* at 14-24). In the analysis that follows, the Commission summarizes key findings in Order No. 547 that it relies upon to support its interpretation of the causal nexus of “due to.”³⁰

1. Purposes and Policies of the PAEA

Congress enacted the PAEA “to help the Postal Service meet the expected challenges from expanding forms of alternative communications in the new century.” Order No. 547 at 6. The purpose of the PAEA “is to position the Postal Service to operate in a more business-like manner.” House Report at 43; see Senate Report at 23. To achieve this goal, the PAEA created a new ratemaking system that would provide clear incentives for the Postal Service to maximize gains and minimize costs. House Report at 43.

Key policies underlying the PAEA include efficiency and cost control. The PAEA permits the Postal Service to retain earnings that may be distributed as incentives to management and employees. *Id.* at 43-44. The PAEA, however, precludes the Postal Service from recovering losses by increasing rates above the price cap without the Commission’s approval. *Id.*

The price cap plays the central role in implementing the purposes and policies of the PAEA. The price cap incents the Postal Service to improve efficiency and reduce its costs and serves as the primary source of discipline over the Postal Service’s expenses. Order No. 547 at 38, 64. It also maintains “adequate financial safeguards and incentives for cost control” and acts as the single most important safeguard for

³⁰ See PR Comments at 18 (“Order No. 547 already provides background on the Commission’s interpretation of Congress’s intent. The Commission need only use this background and apply its expertise in establishing a standard.”); TW Comments at 5 (“[T]he Commission should be mindful that its factual findings, expert judgments regarding testimony, careful recitation of relevant legislative history, and policy evaluations were left undisturbed by the Court’s opinion.”).

mailers by providing rate stability and predictability. Senate Report at 10; Order No. 547 at 12.

Many of the commenters agree that the price cap plays a paramount role in implementing the purposes and policies of the PAEA. Senator Collins, Ranking Member of the Senate Committee on Homeland Security and Governmental Affairs, asserts that “the fundamental purposes of PAEA were to incentivize the Postal Service to improve its business model and to operate more efficiently” and “the cap is intended to induce the Postal Service to improve its business model and, ultimately, its effectiveness.” Senator Collins Comments at 1-2. ANM, et al. discuss the importance of the price cap in providing the Postal Service with greater incentives to control costs and operate more efficiently. ANM, et al. Comments at 5 (citing Order No. 547 at 12).

Similarly, SMC/VDM contend that the price cap “was intended to act as a key incentive for the Postal Service to control its costs and become more efficient.” SMC/VDM Comments at 4. MMA/NPPC advocate an interpretation of the causal nexus of “due to” “that is most consistent with the PAEA’s structure and intent and that supports the primary role Congress assigned to the rate cap.” MMA/NPPC Reply Comments at 2.

The Commission reiterates its finding in Order No. 547 that the price cap is the cornerstone of the modern system of ratemaking under the PAEA. Order No. 547 at 38. While the Postal Service does not dispute the central role of the price cap in furthering the purposes and policies of the PAEA, it argues that the exigency provision’s role in the statutory scheme is more expansive than the role described by the Commission in Order No. 547. The Postal Service also interprets the legislative history differently than the Commission did in Order No. 547. These arguments are considered below.

2. Role of the Exigency Provision in the Statutory Scheme

The Commission evaluates the role of the exigency provision in the statutory scheme within the context of the purposes and policies of the PAEA, including the central role of the price cap. The Commission previously found that the exigency provision is “a narrow exception to the general statutory rule that rates for market dominant products are limited by [the price cap].” *Id.* at 54.

Many of the commenters explain why the exigency provision and the causal nexus of “due to” must be narrowly construed. Senator Collins states that “Congress purposely limited the availability of [the exigency provision] to prevent the Postal Service from using exigent rate increases to circumvent the strict price cap.” Senator Collins Comments at 2. SMC/VDM contend that section 3622(d)(1)(E) “was clearly intended as a narrow exception limited to ‘extraordinary or exceptional circumstances’” and “cannot be construed as a ‘blank check’ provision that allows the Postal Service to piggyback recovery for its other non-exigent financial problems.” SMC/VDM Comments at 4.

MMA/NPPC aver that “a narrow construction [of the exigency provision] would best implement the Congressional intent.” MMA/NPPC Reply Comments at 2. The Public Representative agrees that the exigency provision “is applicable only under limited extraordinary or exceptional circumstances.” PR Comments at 14. ANM, et al. assert that “[k]eeping the price cap effective requires strict limits on Section 3622(d)(1)(E).” ANM, et al. Comments at 6 (citation omitted). They maintain that allowing the Postal Service to use the exigency provision to make itself whole whenever it faces a big loss “would destroy the credibility of the price cap, its incentive effect on the [Postal Service], and the protection that Congress promised mailers by enacting the cap.” *Id.* (citation omitted).

The Commission reaffirms that the exigency provision is a narrow exception to the price cap and that rate adjustments may exceed the price cap only under limited circumstances. Order No. 547 at 13, 54. This interpretation of the exigency provision

effectuates the purposes and policies of the PAEA by maintaining incentives for the Postal Service to improve efficiency and control costs. By contrast, a broader interpretation of the exigency provision would undermine the purposes and policies of the PAEA. An exigency provision that is readily available could enable the Postal Service to use an exigent rate adjustment as a way to generate revenues, which would eliminate incentives to operate efficiently and control costs. As the Commission explained, the exigency provision does not provide an all-purpose exception to the price cap, and the Postal Service may not invoke it simply by demonstrating a need for revenues. *Id.* at 64.

Likewise, the Commission concludes that there should be a close causal nexus between the amount of the proposed adjustment and the net adverse financial impact of the exigent circumstances. This interpretation would best implement the purposes and policies of the PAEA. The words “due to” in the exigency provision prevent the Postal Service from misusing *bona fide* exigent circumstances as a general revenue enhancement mechanism that circumvents the price cap. *Id.* at 56. Such a result would be inconsistent with the broader statutory context in which the exigency provision appears and with the purposes and policies of the PAEA. *Id.*

The Postal Service asserts that a strict interpretation of the causal nexus “is fundamentally at odds with the statutory scheme.” Postal Service Comments at 7. It supports this assertion by arguing that in the statutory scheme the exigency provision is just as important as the price cap because the exigency provision “effectuates objectives of the law that are co-equal in importance to the objectives underlying the price cap.” *Id.* at 8. The objectives referred to by the Postal Service are the objectives set forth in section 3622(b). *Id.* Based on these premises, the Postal Service opposes a strict reading of the exigency provision. *Id.* at 10.

ANM, et al. respond by arguing that the Postal Service made similar arguments to the Court to support its position that the “reasonable and equitable and necessary” requirements, not the “due to” requirement, provides the proper “flexible and practical

standard” for reviewing exigent requests. ANM, et al. Reply Comments at 15 (citing Postal Service Opening Brief at 31, which states, “The PRC’s interpretation thus makes it impossible for the [exigency provision] to ensure that the objectives of § 3622 are achieved.”).

As discussed in Section IV.C.1. above, the price cap plays the central role in implementing the purposes and policies of the PAEA. ANM, et al. correctly point out that the Postal Service’s claim that the exigency provision is equally as central to the pricing system as the price cap and must be balanced against the latter “simply begs the question of what the exigency clause provides.” ANM, et al. Reply Comments at 15.

The Postal Service’s argument that the same objectives in section 3622(b) underlie both the price cap and the exigency provision does not require a relaxed reading of “due to.” First, the price cap provides the general pricing rule for market dominant products. The exigency provision provides an exception to that general rule. As an exception, the exigency provision should not be interpreted to “swallow the rule.”

Second, the Court rejected the Postal Service’s attempt to relegate the status of “due to” to that of a “prepositional phrase” (Postal Service Opening Brief at 5) subordinate to the “reasonable and equitable and necessary” standards of section 3622(d)(1)(E) or the objectives of section 3622(b). See 640 F.3d at 1267 (“The prepositional phrase, however, appears exactly where it belongs—up-front, alongside the directive that the Commission ‘establish procedures’ for making an adjustment—which adjustment must therefore be ‘due to’ the exigent circumstance.”).

Third, to be given effect, the objectives of section 3622(b) need not be incorporated into the “due to” clause by relaxing the causal nexus as suggested by the Postal Service. Those objectives can be given effect in applying the “reasonable and equitable and necessary” tests in a manner analogous to the way in which those objectives are given effect under the price cap. This latter interpretation preserves both the integrity of the price cap and the exigency provision, while giving effect to the

objectives of section 3622(b). For these reasons, the Commission concludes that its interpretation of the causal nexus of “due to” is consistent with the purposes and policies of the PAEA, including the role of the exigency provision in the statutory scheme.

3. Legislative History of the Exigency Provision

The legislative history supports the central role of the price cap and the role of the exigency provision as a narrow exception to it. Order No. 547 at 10, 20. In Order No. 547, the Commission found that the exigency provision evolved from a less restrictive to a more stringent standard. *Id.* at 20. The Postal Service, however, takes issue with that interpretation of the legislative history.

As the Commission explained, earlier iterations of the PAEA would have authorized the Postal Service to obtain an exigent rate adjustment simply by demonstrating that exigent circumstances threatened its fiscal soundness. *Id.* at 21. These circumstances included severe financial exigencies, statutorily-imposed funding obligations, insufficient postal revenues, and unexpected declines in revenue or increases in costs. *Id.* at 21, 64 n.52 (citations omitted).

By contrast, exigency provisions in later bills established a higher bar as exigent circumstances shifted away from situations affecting the fiscal soundness of the Postal Service. *Id.* at 21. Unlike its predecessors, section 3622(d)(1)(E) does not mention the Postal Service’s need for revenues when setting forth the applicable standard for exigent rate adjustments. Rather, section 3622(d)(1)(E) establishes standards that do not directly relate to the Postal Service’s fiscal soundness. They include “either extraordinary or exceptional circumstances,” “reasonable and equitable and necessary,” and “best practices of honest, efficient, and economical management.”

The development of the “reasonable and equitable and necessary” clause also illustrates the trend of narrowing the exigency provision. Earlier bills only required the

Commission to determine whether to grant or deny an exigent request. *Id.* at 22. These bills did not require the Commission to consider or evaluate specific factors when reaching its decision. *Id.* (citation omitted). Under these bills, the Commission could have granted an exigent request without finding that the proposed adjustments met the “reasonable and equitable and necessary” tests.

Later bills narrowed the scope of the Commission’s determination by requiring the Commission to account for certain costs anticipated by the Postal Service, such as wages, benefits, and transportation costs. *Id.* These restrictions culminated in section 3622(d)(1)(E), which requires the Commission to evaluate whether the proposed adjustments are “reasonable and equitable and necessary to enable the Postal Service, under best practices of honest, efficient, and economical management, to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States.” This new standard contains conjunctive, multi-part tests that the Commission must apply and the Postal Service must meet before an exigent request may be granted. *Id.* at 23.

After analyzing the legislative history of section 3622(d)(1)(E), the Commission concluded that section 3622(d)(1)(E) is more restrictive, as a whole, than other exigency provisions in prior bills “because it combines independent requirements proposed separately by the House and Senate” during the 109th Congress. *Id.* at 20. The House’s proposed legislation mandated the “reasonable and equitable and necessary” tests contained in the second half of section 3622(d)(1)(E). *Id.* at 18, 23. The Senate’s proposed legislation required exigent rate adjustments to be “due to unexpected and extraordinary circumstances.” *Id.* at 19 (citation omitted). After revising “unexpected and extraordinary” to “either extraordinary or exceptional,” the PAEA incorporated the Senate’s exigency provision into the first half of section 3622(d)(1)(E). *Id.*

The Postal Service disputes the Commission’s prior review of the legislative history of the exigency provision and argues that section 3622(d)(1)(E) is less strict than the proposed Senate standard. Postal Service Comments at 11. But the Senate bill

only required exigent rate adjustments to be “due to” exigent circumstances. While the Senate bill had a slightly stricter definition of a qualifying exigent circumstance, the PAEA imposed the additional requirements that exigent rate adjustments meet the “reasonable and equitable and necessary” tests. These added requirements make section 3622(d)(1)(E) more restrictive, as a whole, than the exigency provision proposed by the Senate.

4. Guidance Provided by the Court’s Opinion

ANM, et al., the Public Representative, and APWU each comment directly on the guidance provided by the Court in its opinion. ANM, et al. comment on the Court’s discussion of multiple causes of a financial crisis. The Public Representative and APWU discuss the applicability of *Adams v. Director, OWCP*, 886 F.2d 818 (6th Cir. 1989), which was discussed by the Court.

a. Multiple Causes of a Financial Crisis

Although agreeing with the Commission’s plain meaning interpretation of “due to,” the Court concluded that the phrase “due to” also had an additional, ambiguous meaning. The Court cited a case quoting the *Adams* decision, which states:

The words do not speak clearly and unambiguously for themselves. The causal nexus of ‘due to’ has been given a broad variety of meanings in the law ranging from sole and proximate cause at one end of the spectrum to contributing cause at the other.

640 F.3d at 1268 (citations and footnote omitted).

The Court used a financial crisis as an example of such ambiguity and observed that such a crisis, “can often result from multiple contributing factors, of which only one may be ‘extraordinary or exceptional.’” *Id.* The Court stated further that “[i]t would not be incorrect to say that the requested rate increase is ‘due to’ the extraordinary factor simply because it is also ‘due to’ other factors as well.” *Id.* (footnote omitted).

In their comments, ANM, et al., like the Court, address the issue of how the causal nexus of “due to” should be interpreted in the context of a financial crisis. ANM, et al. Comments at 3 (“the Postal Service’s financial shortfall”); 10 (“the Postal Service’s financial needs”); 15 (“the Postal Service’s financial problems”); 16 (“numerous other financial issues” and “financial solvency”); 18 (“current financial crisis”); and 20 (“the Postal Service’s financial problems”). ANM, et al. argue that only the application of a proximate cause standard³¹ will ensure that the strict nexus intended by Congress will be honored:

[P]ermitting the Postal Service to raise rates when the extraordinary or exceptional circumstance is only one of several contributing causes of the Postal Service’s losses, and the other causes include a secular growth in product competition (i.e., the Internet), and long-term or structural factors that have driven up the Postal Service’s costs, would undermine the Postal Service’s incentive to manage its business more efficiently or to prudently prepare itself to deal with these changes.

Id. at 10 (footnote omitted). ANM et al. assert further that using a proximate cause standard “likewise gives Congress incentives to strike an optimal balance between the Postal Service’s financial needs and other policy goals that could be advanced by imposing costs and burdens on the [Postal Service] through legislation.” *Id.*

As support for their position, ANM, et al. rely upon analogies to the “proximate causation” standard used in tort law for apportioning liability among multiple actors and to the “efficient cause” standard employed in insurance coverage litigation to determine the scope of property insurance coverage. *Id.* at 11. ANM, et al. argue that tort law standards are appropriate because they “encourage optimal cost-saving measures and risk-avoidant behavior.” *Id.* Likewise, insurance litigation standards attribute loss to

³¹ In their comments, ANM, et al. use the terms “primary cause,” “efficient cause,” “proximate causation,” or “efficient proximate cause” to refer to their recommended interpretation of the causal nexus. For convenience, the Commission will use the term “proximate cause” to refer ANM, et al.’s recommended interpretation.

predominant, prime, or moving cause that sets the others in motion. *Id.* at 11-12. ANM, et al. analogize the exigency provision to “an insurance policy that compensates the Postal Service only for losses caused by extraordinary or exceptional circumstances.” *Id.* at 12.

The Postal Service opposes ANM, et al.’s recommended proximate cause standard. Postal Service Reply Comments at 5-11. Among the reasons offered by the Postal Service for rejecting the proximate cause standard are its assertions that: (1) losses resulting from an exigent circumstance and the financial crisis are separate and distinct from determining whether “due to” has been met, and the fact that an exigent rate adjustment may not solve the Postal Service’s entire financial situation is beside the point (*id.* at 6-7); (2) the Court found that an exigent rate adjustment is “due to” an exigent circumstance even if an overall financial crisis is the result of multiple factors (*id.* at 7, citing 640 F.3d at 1268); (3) the standards in the “necessary under honest, efficient, and economical management” clause adequately address ANM, et al.’s concerns that the Postal Service have adequate incentives to cut costs (*id.* at 7-8); (4) it is not the Commission’s role to incent Congress to take legislative action (*id.* at 8-9); and (5) ANM, et al.’s proposed standard would effectively preclude the Postal Service from ever obtaining an exigent rate adjustment (*id.* at 11).

The Commission is not persuaded that adoption of ANM, et al.’s proximate cause standard would be appropriate or necessary. The proximate cause standard comes from areas of the law that are unconnected to the exigency provision and its unique history and position in postal regulatory law. Moreover, the term “proximate cause” lacks a single, widely accepted definition. For example, in tort law, the term “proximate cause” has recently been referred to by the Supreme Court as “notoriously confusing”. *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2642 (2011). To use the concept of “proximate cause” when interpreting the causal nexus of “due to” would unduly complicate the Postal Service’s duty to demonstrate the required causal nexus, as well as the Commission’s review of the adequacy of the Postal Service’s demonstration.

Second, ANM, et al.'s suggestion that using the proximate cause standard would incentivize action by Congress is misplaced. It is not the Commission's role in an exigent rate case proceeding to provide incentives to Congress, but rather to apply the law in a manner that is consistent with congressional intent.

Finally, the Commission does not find it necessary to adopt the proximate cause standard to ensure that an exigent rate adjustment meets the "due to" requirement of the exigency provision. In Order No. 547, for example, the Commission did not find that the financial crisis facing the Postal Service was an extraordinary or exceptional circumstance. Rather, the Commission found that "the recent recession and its impact on postal volumes was an 'extraordinary or exceptional' circumstance." Order No. 547 at 50. The Commission's more limited finding, by definition, narrowed the scope of the proposed adjustment.

In Section IV.C.6 below, the Commission addresses the proof generally required to support the causal nexus of "due to." In demonstrating the requisite causal nexus, the Postal Service is required to exclude non-exigent impacts, such as on-going electronic diversion of mail volumes. Adopting ANM, et al.'s proximate cause standard is not necessary in order to exclude the impact of non-exigent circumstances. In fact, adopting that standard would unnecessarily complicate the task of excluding adverse impacts not caused by the exigent circumstances.

b. Applicability of *Adams* Decision

Both the Public Representative and APWU address the potential implications of the *Adams* decision cited by the Court. *Adams* involved an agency's denial of benefits under the Black Lung Benefits Act (BLB Act) to a coal miner suffering from the lung disease pneumoconiosis. 886 F.2d at 819. The BLB Act has a provision similar to section 3622(d)(1)(E) that requires miners to demonstrate that they are "totally disabled due to pneumoconiosis" before they can obtain benefits under the BLB Act. See *id.* at 820 (citing 30 U.S.C. § 901(a)). As with the exigency provision, neither the BLB Act nor

its regulations mentions the degree of causation required to prove “total disability due to pneumoconiosis.” See 886 F.2d at 821-22. The *Adams* court interpreted the degree of causation required under the BLB Act and concluded that miners must establish that their totally disabling respiratory impairment was “due ‘at least in part’ to” their pneumoconiosis. *Id.* at 825.

The Public Representative argues that the Court’s discussion of *Adams* provides guidance for the Commission to interpret the causal nexus of “due to.” PR Comments at 11. However, he asserts that the Court does not, and cannot, suggest that the Commission adopt the “due ‘at least in part’ to” standard set forth in *Adams*. *Id.* at 11 n.9. The Public Representative recommends that the Commission follow the guidance in *Adams* to adopt an interpretation “consistent with Congressional intent and supported by the underlying principles and purpose of the PAEA.” *Id.* at 12. He then distinguishes between the purposes and policies of the BLB Act and the PAEA. *Id.* at 12, 14.

By contrast, APWU suggests that the Court’s discussion of *Adams* precludes the Commission from adopting a strict interpretation of the causal nexus of “due to.” APWU Comments at 3. APWU asserts that the *Adams* court rejected a strict interpretation of “due to” because the BLB Act does not refer to the degree of causation required. *Id.* Likewise, APWU submits that the exigency provision does not require or support a strict standard. *Id.* at 4.

The Commission agrees that the Court’s discussion of *Adams* guides its interpretation of the causal nexus of “due to.” The *Adams* court adopted an interpretation consistent with congressional intent and the regulatory framework of the BLB Act. 886 F.2d at 825 n.9. Similarly, the Commission interprets the causal nexus of “due to” consistent with congressional intent and the regulatory framework of the PAEA.

The Commission has reviewed *Adams* and similar cases discussing the degree of causation under the BLB Act. Based on its review, the Commission finds that the “due ‘at least in part’ to” interpretation adopted by the *Adams* court is not applicable to

the exigency provision because the purposes and policies of the PAEA differ from those of the BLB Act. The *Adams* court stated that “the [BLB] Act is remedial legislation that should be liberally construed so as to include the largest number of miners within its entitlement provisions.” *Id.* at 825 (citations omitted). It explained that miners face “severely limited resources” in proving causation and that Congress enacted the BLB Act to help miners who were unable to recover benefits under state law because of burdensome causation requirements. *Id.*

Unlike the provision in the BLB Act, the exigency provision is limited to “either extraordinary or exceptional circumstances.” It is not intended as a remedial provision, but rather as a narrow exception to the price cap. Moreover, unlike miners seeking to recover under the BLB Act, the Postal Service, as an institution, has the resources to demonstrate the requisite causal nexus of “due to.” The Postal Service undertakes similar calculations on a regular basis in periodic reports that it submits to the Commission. For example, each year the Postal Service provides econometric estimates of demand elasticity for all postal products. See 39 CFR 3050.26.

Also, the potential for financial recovery under the PAEA far exceeds that under the BLB Act. Miners under the BLB Act receive benefits amounting to thousands of dollars per year.³² By contrast, in its Exigent Request, the Postal Service sought to obtain *billions* of dollars per year, potentially in perpetuity. Even setting aside differences in the enabling legislation, the magnitude of the proposed adjustment (billions of dollars in the instant case) requires more rigorous estimation techniques and a more persuasive showing that the sums sought are the result of the exigent circumstances.

³² For 2011 and 2012, the maximum monthly benefit paid under the BLB Act is \$1,251. United States Department of Labor, Office of Workers’ Compensation Programs, Division of Coal Mine Workers’ Compensation, “Black Lung Monthly Benefit Rates for 2011 – 2012,” *available at* <http://www.dol.gov/owcp/dcmwc/regs/compliance/blbene.htm>; see 30 U.S.C. § 922(a)(1).

5. Causal Nexus Between Exigent Rate Adjustments and the Impact of Exigent Circumstances

The Court directed the Commission to determine “how closely the amount of the adjustments must match the amount of the revenue lost as a result of the exigent circumstances.” 640 F.3d at 1268. The Commission concludes that exigent rate adjustments are permitted only if, and to the extent that, they compensate for the net adverse financial impact of the exigent circumstances.

An exigent rate adjustment may only be used to compensate for the adverse financial impacts of exigent circumstances that are over and above adverse impacts the Postal Service would encounter in the normal course of business. This ensures that an exigent rate adjustment defrays only those expenses that the Postal Service was not expected to recover under the price cap. Such a result is consistent with the language of the section 3622(d)(1)(E), the purposes and policies of the PAEA, the role of the exigency provision in the statutory scheme, and the legislative history underlying the exigency provision.³³

The Commission finds that exigent rate adjustments must be causally linked to the *net* adverse financial impact of the exigent circumstances rather than the amount of revenue lost. Given the exigent circumstances found to have occurred in this case, the net adverse financial impact would consist of the lost contribution associated with the volume declines from the 2008-2009 recession.

In reaching these conclusions, the Commission also finds that the “general proportionality” standard proposed by the Postal Service is inconsistent with a proper interpretation of the causal nexus of “due to.” The Commission shares the concerns raised by commenters that this standard is subjective and would permit exigent rate adjustments that exceed the net adverse financial impact of the exigent circumstances.

³³ The Public Representative agrees that “[e]xigent circumstances should be considered atypical to the normal business operation of the Postal Services....” PR Comments at 16. He maintains that Congress intended the price cap “to address normal business fluctuations that do not rise to the level of exigent circumstances.” *Id.*

See SMC/VDM Reply Comments at 4 (criticizing the “general proportionality” standard as “overly vague and loose, opening the door to broad stabs at an impact estimate that could go well beyond the actual impact of the exigent circumstance.”); ANM, et al. Reply Comments at 5 (asserting that the Postal Service “advocates requiring only a showing of causation-in-fact, and a loose one at that.”); MMA/NPPC Reply Comments at 3 (arguing that the “general proportionality” standard is “far less rigorous” and “effectively meaningless—elastic, open-ended, and apparently perpetual.”); PR Reply Comments at 3 (contending that the “general proportionality” standard is “totally subjective and very well could lead to different results dependent upon the differing inclinations of the persons evaluating the exigent request.”).

To summarize, the Commission concludes that to demonstrate that an exigent rate adjustment compensates for the net adverse financial impact of the exigent circumstances, the Postal Service must:

- (1) Quantify the net adverse financial impact of the exigent circumstances; and
- (2) Demonstrate that the amount of the proposed adjustment does not exceed the net adverse financial impact of the exigent circumstances.

6. Proof Required to Demonstrate the Causal Nexus of “Due to”

In this section, the Commission provides general guidance regarding the proof required to demonstrate the causal nexus of “due to.”

a. Quantification Requirements

To establish the requisite causal nexus of “due to,” the Postal Service must quantify the net adverse financial impact of the exigent circumstances. In general, most commenters agree that the Postal Service must quantify the financial harm resulting from the exigent circumstances. SMC/VDM argue that the Postal Service must provide “a reasonable and supported estimate of the actual financial harm caused solely by the

exigent circumstance....” SMC/VDM Comments at 5. Senator Collins contends that a proposed adjustment must be “quantitatively, demonstrably, and causally linked to the exigent circumstances.” Senate Collins Comments at 2. GCA asserts that the Postal Service must demonstrate “a substantial *quantitative* equality between the financial damage resulting from the exigency and the incremental revenue asked for.” GCA Comments at 7 (emphasis in original).³⁴

The Postal Service’s “general proportionality” standard appears consistent with the standards proposed by commenters who support a quantification requirement.³⁵ Moreover, the “general proportionality” standard assumes a quantification requirement. As the Public Representative points out, the “general proportionality” standard “does appear to require a quantification of both the exigent increase and the impact on the Postal Service of the extraordinary or exceptional circumstances. PR Reply Comments at 3. He contends that “this would be a logical step in evaluating whether or not the size of an exigent increase is generally proportional to the impact on the Postal Service of the extraordinary or exceptional circumstances.” *Id.*

However, the commenters diverge on the causal nexus between an exigent rate adjustment and the financial impact of the exigent circumstances. While the Postal Service maintains that an exigent rate adjustment need only have “general proportionality” to the financial impact of the exigent circumstances, most commenters agree that the financial impact of the exigent circumstances is the upper bound of any exigent rate adjustment.

³⁴ GCA also argues that the application of the causal nexus must extend to individual classes. *Id.* at 16. The Public Representative opposes this interpretation, asserting that GCA has cited no specific statutory provision requiring this connection. PR Reply Comments at 5. The Commission rejects GCA’s unsupported assertion. Rejection of this proposal does not, of course, preclude GCA from opposing a proposed adjustment under the “reasonable and equitable and necessary” tests.

³⁵ The Postal Service finds similarities between its interpretation and those of GCA, SMC/VDM, the Public Representative, and APWU, who “generally agree that there must be proportionality between the size of the requested increase and impact of the exigent circumstances on the Postal Service.” Postal Service Reply Comments at 2.

When quantifying the net adverse financial impact of the exigent circumstances, the Postal Service must factor out the financial impact of non-exigent circumstances, such as the continuing effects of electronic diversion. This process ensures that an exigent rate adjustment is limited to the adverse effects of the exigent circumstances as opposed to other, non-exigent factors.

This requirement is consistent with the positions taken by several commenters. SMC/VDM argue that “the only financial impacts that can be recouped through section 3622(d)(1)(E) are those caused by the exigent circumstance *per se*, factoring out the effects of other non-extraordinary factors.” SMC/VDM Comments at 4. The Public Representative contends that the exigency provision “allow[s] recovery only from the effects of an exigent circumstance” and that the Postal Service failed to “estimate the effects of the recession separate from the effects of electronic diversion in presenting its exigent Request.” PR Comments at 15, 18. GCA agrees that an exigent rate adjustment is limited to “the financial impact shown to have resulted from the exigent event(s), and them only.” GCA Comments at 6.

In its calculation, the Postal Service is not required to quantify the net adverse financial impact of the exigent circumstances with absolute precision. The commenters agree that calculating the net adverse financial impact of the exigent circumstances will always involve some degree of imprecision. See, e.g., SMC/VDM Comments at 5; PR Comments at 17 n.11. Some exigent circumstances, however, lend themselves to more accurate quantifications than others. For example, in its comments, the Postal Service acknowledges that, “[i]n some circumstances, a precise match may be relatively easy to make such as in the circumstance when the Postal Service is simply seeking an exigent increase to finance the purchase of discrete equipment necessitated by the sending of anthrax, or to remediate environmental damage caused by the attack.” Postal Service Comments at 14-15 (citing Order No. 547 at 56).

In summary, the Commission requires the Postal Service to quantify the net adverse financial impact of the exigent circumstances, but does not require absolute precision.

b. Nature and Amount of Proof

The evidence needed to support the Postal Service quantification will vary in degree depending on the nature of the exigent circumstances, the amount of the proposed adjustment, and the complexity of the exigent request. The Commission understands the Public Representative's concern about examining exigent requests on a case-by-case basis (PR Reply Comments at 3), but concludes that the nature and amount of proof supporting an exigent request require a degree of flexibility to address the range of exigent circumstances that may arise. As APWU points out, it is "impossible to predict the circumstances" triggering future exigent requests. APWU Comments at 2.

For example, the net adverse financial impact of the recession and its impact on postal volumes present different evidentiary challenges than would the net adverse financial impact of a natural disaster that destroyed Postal Service facilities. In the first case, it would appear that statistical information and expert analysis would be part of the proof needed to establish the requisite causal nexus. In the latter case, the proof needed would more likely include evidence on equipment expenses and other types of traditional construction cost information.

c. Supportable Quantification Methods

Regardless of the nature and amount of proof required, the quantification offered by the Postal Service to support an exigent request must be justified through supportable methods commensurate with the amount of the proposed adjustment. Vague generalizations and unsupported conclusory statements are not sufficient. Historically, the Postal Service has demonstrated an ability to develop and refine

methodologies for measuring and projecting costs in a variety of Commission proceedings. Using sophisticated data collection and estimation methodologies, as well as expert opinions and statistical analyses, the Postal Service has been able to address difficult financial and economic estimation problems. Such tools are available in exigent rate case proceedings as they have been in other Commission contexts. The APWU contention that the exigent circumstances identified in this case defy quantification is unpersuasive. *See id.* at 4.

Supportable methods justifying the quantification must be commensurate with the amount of the proposed adjustment. A larger amount requires more rigorous estimation techniques and a more persuasive showing that the sums sought are the result of the exigent circumstances.

The Postal Service has the resources and ability to justify its quantification through supportable methods commensurate with the amount of the proposed adjustment. It undertakes similar calculations by quantifying the effects of electronic diversion on First-Class Mail volume in periodic reports that it submits to the Commission. Each year, the Postal Service must provide econometric estimates of demand elasticity for all postal products accompanied by the underlying econometric models and input data sets used. 39 CFR 3050.26. The Postal Service uses a volume forecasting methodology that enables it to distinguish and account for the impact of multiple factors that have affected First-Class Mail volumes.³⁶ The Commission expects the Postal Service to apply similar methodologies to quantify the net adverse financial impact of the exigent circumstances.

d. Does Not Exceed the Net Adverse Financial Impact

Finally, the Postal Service must demonstrate that the amount of the proposed adjustment does not exceed the net adverse financial impact of the exigent

³⁶ See Market Dominant Products: USPS Demand Equation Estimation and Volume Forecasting Methodologies, Volume Forecasting Methodology of the United States Postal Service (January 20, 2011).

circumstances. In other words, in an exigent request, the Postal Service may seek an exigent rate adjustment that is less than or equal to the quantified net adverse financial impact of the exigent circumstances.

This requirement is supported by the statutory text and by the Commission's rules implementing the exigency provision. Section 3622(d)(1)(E) permits an exigent rate adjustment "provided there is not sufficient unused rate authority...." The Commission's rules require the Postal Service to "exhaust all unused rate adjustment authority for each class of mail" before obtaining an exigent rate adjustment. 39 CFR 3010.63(c). This obligation illustrates the narrow scope of the exigency provision. If Congress had intended for an exigent rate adjustment to exceed the net adverse financial impact of the exigent circumstances, it would not have required the Postal Service to first exhaust its unused rate adjustment authority.

Similarly, the statutory requirement that an exigent rate adjustment be "reasonable and equitable and necessary to enable the Postal Service, under best practices of honest, efficient, and economical management, to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States" reflects congressional intent to ensure that the justifications for exigent rate adjustments are carefully scrutinized. See 39 U.S.C. § 3622(d)(1)(E). Even if the Postal Service demonstrates that proposed adjustments are "due to" exigent circumstances, it may not obtain an exigent rate adjustment unless the proposed adjustments also meet the "reasonable and equitable and necessary" tests.

e. Administrative Feasibility

The Postal Service argues that its "general proportionality" standard is required for reasons of administratively feasibility. Postal Service Comments at 14-16. It supports its argument with claims that the expedited 90-day review period in an exigent rate case proceeding, difficulties in "untangling the interaction of multiple factors[.]" and

other difficulties in compiling information will constrain its ability to determine the effect of a particular exigent circumstance and to accomplish other critical tasks. *Id.* at 14-15.

These concerns are misplaced. They are predicated upon the assumption that the causal nexus of “due to” requires a “strict level of precision,” “absolute precision,” or “perfect proportionality.” *Id.* at 15. However, as the discussion in the preceding Sections IV.C.6.a-d makes clear, the required showings do not require the extreme degree of precision assumed by the Postal Service. The Postal Service is not expected to engage in “a quixotic search for perfect proportionality....” *Id.* It is simply expected to support its exigent request with credible proof of the type described above.

V. FURTHER PROCEDURES

The Postal Service takes the position that the Commission has an obligation on remand, not only to interpret the causal nexus of “due to,” but also to issue a ruling on the Exigent Request. Postal Service Reply Comments at 12. It concedes, however, that the Commission must evaluate the Exigent Request “*after* it correctly interprets the statute and determines the proper standard to apply not only in future cases but in this one as well.” Opposition to ANM, et al. Motion to Strike at 2 (emphasis in original).

The Court’s remand was for the limited purpose of affording the Commission the opportunity to interpret the causal nexus of “due to.” See Section IV.B.2 above. However, the Exigent Request remains pending, and the Commission remains legally obligated to apply its interpretation of the causal nexus of “due to” by granting or denying the Exigent Request if the Postal Service wishes to pursue it.

Some comments suggest that the Commission’s findings in Order No. 547 obviate the need to apply the Commission’s interpretation of the causal nexus of “due to” to the Exigent Request. ANM, et al. argue that the Commission must deny the Exigent Request because it already found that “the Postal Service made no showing of causation *at all* in its request for an exigent increase.” ANM, et al. Comments at 14 (citing Order No. 547 at 4, 58-60) (emphasis in original). The Public Representative shares a similar view, urging the Commission to use its findings of no causation in Order No. 547 to summarily reject the Exigent Request.³⁷

The Postal Service has claimed that any failure to explain how its proposed adjustments were “due to” the exigent circumstances can be traced to its lack of knowledge of what the Commission considered necessary. See, e.g., Postal Service Opposition to PR Motion to Strike at 2. At the same time, it includes in its comments

³⁷ PR Comments at 7, 19. Instead, the Public Representative recommends that the Commission initiate a separate rulemaking proceeding to consider the proper interpretation of the causal nexus of “due to.” *Id.* at 8, 19. The Commission rejects this proposal and offers its interpretation of the causal nexus of “due to” in this proceeding.

four separate potential justifications that it believes adequately link the proposed adjustments to the financial impact of the exigent circumstances. Postal Service Comments at 24-53. Several participants strongly oppose these materials, contending that they pose significant procedural due process concerns. See ANM, et al. Motion to Strike at 4-5; PR Motion to Strike at 2.

The Commission concludes that the appropriate course at this stage is to adopt the following procedures for a systematic, procedurally-balanced resolution of this case. The Postal Service is directed to file a statement indicating whether and how it wishes to pursue its pending Exigent Request. This statement is due no later than October 4, 2011.

If it desires to pursue its Exigent Request based on the record as of September 30, 2010, the Postal Service shall, with its statement, include an explanation for the basis for its claim that the record satisfies the causal nexus of “due to,” as interpreted by the Commission in this Order, as well as the remaining requirements of section 3622(d)(1)(E). The Postal Service shall also identify with particularity those portions of the record as of September 30, 2010 that it believes support its Exigent Request.

Should the Postal Service pursue its Exigent Request based on the record as of September 30, 2010, interested persons will have until October 18, 2011 to respond to the Postal Service’s statement.

If the Postal Service wishes to supplement the factual materials in the record in light of this Order, it shall, by separate motion, request leave to supplement. It should indicate the nature and extent of the new materials it intends to add, how it will sponsor that evidence, and when such evidence will be filed. Persons wishing to respond to any such motion shall respond in accordance with the Commission’s rules of practice.

Following receipt of the Postal Service’s statement and any responses from interested persons, as well as, if applicable, the Postal Service’s motion to supplement and any answers, the Commission will establish additional procedures as necessary by

further order. It will provide interested persons an appropriate opportunity to respond to additional evidence or arguments submitted by the Postal Service.

In establishing the foregoing procedures, the Commission expressly recognizes the pendency of the Motions to Strike. In light of the procedures adopted in this Order, the Commission denies the Motions to Strike without prejudice.

VI. ORDERING PARAGRAPHS

It is ordered:

1. The Commission interprets the causal nexus of “due to” as set forth in the body of this Order.
2. The Postal Service is directed to file a statement indicating whether and how it wishes to pursue its Exigent Request, as described in the body of this Order, no later than October 4, 2011.
3. Should the Postal Service pursue its Exigent Request based on the record as of September 30, 2010, interested persons will have until October 18, 2011 to respond to the Postal Service’s statement.
4. The Public Representative Motion to Strike Portions of the Postal Service's Initial Comments or for Alternative Relief and the Motion to Strike of Alliance of Nonprofit Mailers, Association for Postal Commerce, Direct Marketing Association and Magazine Publishers of America, Inc. are denied without prejudice.

By the Commission.

Shoshana M. Grove
Secretary

COMMENTS AND REPLY COMMENTS

PARTICIPANT	TITLE	FILING DATE
Alliance of Nonprofit Mailers, Association for Postal Commerce, Direct Marketing Association, Inc., and Magazine Publishers of America, Inc. (ANM, et al. Comments)	Comments of Alliance of Nonprofit Mailers, Association for Postal Commerce, Direct Marketing Association and Magazine Publishers of America, Inc,	July 25, 2011
Alliance of Nonprofit Mailers, Association for Postal Commerce, Direct Marketing Association, Inc., and Magazine Publishers of America, Inc. (ANM, et al. Reply Comments)	Reply Comments of Alliance of Nonprofit Mailers, Association for Postal Commerce, Direct Marketing Association and Magazine Publishers of America, Inc.	August 1, 2011
American Postal Workers Union, AFL-CIO (APWU Comments)	Initial Comments of American Postal Workers Union, AFL-CIO	July 26, 2011
Senator Susan Collins (Senator Collins Comments)	Letter from Senator Susan M. Collins, Ranking Member, Senate Committee on Homeland Security and Governmental Affairs, to Shoshana Grove, Secretary, Postal Regulatory Commission	July 25, 2011
Greeting Card Association (GCA Comments)	Initial Comments of the Greeting Card Association	July 25, 2011
Greeting Card Association (Detailed Analysis)	Detailed Analysis	July 25, 2011
Greeting Card Association (GCA Reply Comments)	Reply Comments of the Greeting Card Association	August 1, 2011
Greeting Card Association (Detailed Analysis - Reply Comments)	Detailed Analysis - Reply Comments of the Greeting Card Association	August 1, 2011
Major Mailers Association and National Postal Policy Council (MMA/NPPC Reply Comments)	Comments of the Major Mailers Association and the National Postal Policy Council	August 1, 2011

PARTICIPANT	TITLE	FILING DATE
Public Representative (PR Comments)	Public Representative Comments on Remand Concerning the Exigent Request of the United States Postal Service	July 25, 2011
Public Representative (PR Reply Comments)	Public Representative Reply Comments on Remand Concerning the Exigent Request of the United States Postal Service	August 1, 2011
Saturation Mailers Coalition and Valassis Direct Mail, Inc. (SMC/VDM Comments)	Initial Comments of the Saturation Mailers Coalition and Valassis Direct Mail, Inc.	July 25, 2011
Saturation Mailers Coalition and Valassis Direct Mail, Inc. (SMC/VDM Reply Comments)	Reply Comments of the Saturation Mailers Coalition and Valassis Direct Mail, Inc.	August 1, 2011
Time Warner Inc. (TW Comments)	Initial Comments of Time Warner Inc. in Response to Commission Order No. 757	July 25, 2011
Time Warner Inc. (TW Reply Comments)	Reply Comments of Time Warner Inc.	August 1, 2011
United States Postal Service (Postal Service Comments)	Initial Comments of the United States Postal Service Regarding Court Remand	July 25, 2011
United States Postal Service (Postal Service Reply Comments)	Reply Comments of the United States Postal Service Regarding Court Remand	August 1, 2011